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CURRENT TOPICS.

The remarks of the Supreme Court of Missouri, in the recently decided case of Williamson v. Bailey, in expressing the hope that cases of that character should not find their way to courts of last resort, may not only be taken to heart by those who betray affection for gaining notoriety through the medium of the courts, but will afford good food for sober reflection among those who have given the subject of law reform attention. Williamson sued Bailey for the mere pittance of $2.50. The latter filed a set-off, and was successful, both in the justice's court and in the circuit court, whither the plaintiff had carried it. Fortune smiled upon the plaintiff, however, when he reached the top of the ladder, and the consequences are that Bailey is now among his friends seeking a loan of $400, with which to pay the costs, and that the court has decided two stale points of law. Here were two representatives of that singular class of litigants, who treat expense as an element of minor importance, and use (or, rather, abuse) the judicial system, maintained at the public expense, to vent their spleen. They cannot have considered the paltry sum, which was the basis of the suit, as of any consequence; they were merely pursuing the policy of the indignant suitor of doing "anything and spending any amount to beat my adversary."

Any system which makes such proceedings possible, must be radically defective. It is true that people are so prejudiced against the legal profession that any suggestion of reform which would seemingly abridge the rights of the poorer class, would seem to be out of place. We are conscious of the popular cry that the rights of the poor man should be on a par with those of the capitalist. We see almost daily some discussion by the narrow-minded lay press, upon the injustice of the $5,000 limitation upon the right of appeal to the Federal Supreme Court. We are aware of the fact that a dollar is as dear a thing to contend for, to some, as a larger sum is to others. But we know from the experience of the litigants before us, and we challenge any one to refute the claim, that it is generally true that litigation has always been the curse of the poor man. Litigation for small sums cannot be profitable from any point of view. It merely betrays the mental weakness of the litigants.

The judicial system is created by the public; it is maintained at the expense of the public; the benefit to the public from the use of it should be the sole criterion of the question whether it should be extended or abridged. Can the public welfare be subserved by such litigation as this case presents? Can it be public policy to furnish poor people with instruments for their own destruction? Does the apparent vindication of an insignificant right have a beneficent influence upon the people? Should commissions be created in order that these petty fights may be continued? What would we suggest, it may be asked. We contend that the same rules should govern our State judiciary, in a sense, as those which regulate actions brought in the Federal courts. When an issue of fact is tried once, let it be forever settled. When an issue in law arises, let the question remain with the judge at *nisi prius*, except where the amount involved exceeds a specified sum, say $100 or $200, or when the question is deemed by him of such importance that the decision thereof would be desirable by the community. There can be no distrust of the honesty and ability of the trial judge, for he comes from the people, and is elected by them. The Federal system works most satisfactorily. The only dissatisfaction expressed is that the limit is not larger.

An examination o the records of appellate courts will reveal the fact that a large portion of their time is occupied in the hearing of these petty concerns. The prejudice existing against the profession and the judiciary is due, in a great measure, to these small disputes. The dissatisfaction which adverse decisions creates, breeds contempt for the judicial power. The sooner the cause is removed, so much earlier will the undesirable effects disappear. The rights of the people would be amply protected. Public opinion would be as lively as ever, and would prevent any encroachments or arbitrary exercise of authority. The only unpleasant result would be to that class of litigants, who become so

crazed with malice as to lose their judgment, and who would be compelled to swallow the pills themselves, which they have prepared to stuff down the throats of their adversaries.

The recent action of one of the Boards of Bar examiners of Ohio, in rejecting the applications of seventeen out of twenty-one of the applicants for admission to the bar, may seem at first impression, harsh and arbitrary, but, upon second thought, it must be admitted that it is but a move in the direction which has been taken none too early, and which should have taken years ago, throughout the West. The profession, from the facilities offered to the student, has become crowded with men entirely incompetent for its ardnous duties; their incompetency compels them to resort to trickery, to eke out a living, and not only do they ultimately come to grief, but they continue to increase the prejudice of the people against the bar, and strengthen the impression, which has always prevailed, that the bar is but a nest of rascality, and that these men are excellent vouchers for the characters of all. The bar and the judiciary hold the power in their hands. The standard of knowledge and ability, can be fixed by them alone, and it lies within their scope to raise it so high, that none but those who can do honor to the profession can be admitted to its fold. In the medical profession "quacks" may thrive; but the legal "quack" is at once discovered and he makes no headway. To admit men who do not come within the standard we contend for, is to build their misfortune, for they wind up in failures, and when their conceit forbids them to retrace their steps, they wish, but too late, that they had devoted their over-estimated energies to some other employment.

This movement for the elevation of the standard has been a theme for discussion all over the country; but no section so sadly needs its early adoption as the West. In the East, the western lawyer is considered the very embodiment of ignorance. Upon the old theory that the quality of the bar is a faithful index of the ability of the bench, the eastern bar has become imbued with the idea that the western bench is entitled to little, if any respect. If you assure them that there is nothing in it, they only scream the louder. Every thin-brained student is with the utmost candor, advised to "turn his face toward the setting sun" as the West is the only field where a lack of intellect is profitable. It is very little consolation to us to argue among ourselves that these impressions are unfounded; they should stimulate us in our efforts to remove the grounds for them. Let the standard be raised. Let us show our eastern brethern that we recognize ability, as keenly as they. Let us convince them that the notions which have become rooted in their minds, should be cast aside, and then, and not until then, will the bar and bench of the West be looked upon with that respect, which the framers of the Federal constitution contemplated should be entertained.

What would seem to be a harsh application of the maxim *Actio personalis cum persona moritur*, may be seen in Chapman v. Day-recently decided by the English Court of Appeal. The plaintiff therein brought suit to recover damages for injury to his land, by working mines beneath, and recovered a judgment, which directed that the damages should be assessed by an arbitrator upon certain principles laid down by the court. Pending the proceedings before the arbitrator, the defendant died and his death, according to the court, abated the proceedings. Ireland's case (4 Taunt. 885), in which the plaintiff died after he had recovered a verdict of £1500, and while his counsel were waiting to move for judgment, the plaintiff died, which action on his part, pained the court so much that, out of respect for his memory, it adjourned the whole proceeding *sine die*, will now have a companion, with which it may share the ridicule which such decisions beget. A rule which is productive of such injustice, works more harm than good, and the sooner the legislative power sweeps away the last vestige of its remains, so much sooner will the law receive entire respect. It is absurdities of this character which have created the prejudice which exists in the minds of laymen to-day and which courts and counsel should seek to remove.

LIABILITY OF A PARENT FOR THE TORTS OF HIS MINOR CHILD.

Perhaps no notion has become more deeply rooted in the minds of laymen, and of a considerable number of professional men, than that a parent is responsible for the misdoings of his children. The idea that there should be some one pecuniarily responsible, to answer for every injury, coupled with the fact that parents are alone responsible for the existence of their children, would seem to make such a notion natural and consistent with common sense and justice.[1] But notions are generally impulsive conclusions from false propositions, conceived without deliberation, and, therefore, unreliable. It is surprising that a subject of such importance, should at this late day, in the history of our common law, have received judicial notice on but one occasion in the courts of England, and in but six of the courts of this country. It is unfortunate that a question of such moment should be still debatable in the courts of thirty-two States, as well as in our Federal courts, and that private wrongs should be settled upon popular notions of what the law may be.

On the part of those who consider the popular notion correct, it is urged that a father has the absolute and exclusive control over his children; that he is alone responsible for their being; that they have been brought into this world for the personal gratification of their progenitors, who reap the only benefits to be derived from them; that it is their duty to educate them in the paths of virtue; to instruct them in the difference between right and wrong, and as to the rights of others; to warn them of the consequences of the violation of those private rights; and to impress upon their minds the duties they should perform and the line of conduct they should adopt, in order to become law abiding men: that nothing but the dereliction of these parental duties, the culpable neglect of the education of children, the failure to exact that obedience to parental commands which is due, indifference to their future welfare, and the omission to administer that moderate chastisement which is justifiable and necessary in cases of impropriety, can be the cause of that reckless condition of mind, which impels children to the commission of deeds which result in loss to innocent third persons; and that did any other doctrine obtain, selfish parents might care nothing for their children, except for such time as they might use them for the advancement of their own ends, then turning them out as prey upon the world.

To this it is replied, that such arguments are extremely notional, being drawn from facts which are assumed to exist, but which have never existed nor can exist; that the idea that parents would conduct themselves in such a manner towards their children, is absurd; that children are brought into this world, not for the gratification of their parents, but in the fulfillment of duties to mankind and for their benefit, any other theory being barbarous; that did the contrary doctrine prevail, the fortunes of parents would depend upon the whims of their children, and might be lost in a single day by their misdoings; that, to prevent such consequences, physical restraint would become necessary, which would be revolting to reason; that parents have nothing to gain from the indiscretion of their children, and that the policy of the law is to hold only wrong-doers and those benefitted by their acts, responsible for the consequences.

To obtain a more intelligent idea of the proper rule, it will not perhaps be out of place to make a slight reference to those rules of law which govern parent and child. It is important to observe that a parent is entitled to the exclusive custody of his child until he attains his majority, and to provide a testamentary guardian who may act in his stead, in the event of his death.[2] He has also the absolute control of his education, and may choose for him the religious doctrines which he shall embrace, and the profession, art or trade which he shall

[1] Baker v. Haldeman, 24 Mo. 219.

[2] People v. Olmstead, 27 Barb. 9; *Ex parte* McClellan, 1 Dowl. P. C. 34; De Manneville v. De Manneville, 10 Ves. 52; Warde v. Warde, 2 Phila. 786; *Ex parte* Hopkins, 3 P. Wms. 152; Miner v. Miner, 11 Ill. 43; Cole v. Cole, 23 Iowa, 433; Huison v. Walts, 40 Ind. 170; Rush v. Vanvacter, 9 W. Va. 600; State v. Baird, 6 C. E. Green, 384; Smith v. Peter, 13 Ill. 138; Rex v. Greenhill, 4 Ad. & Ell. 624; Lilley v. Lilley, 4 R. (Scott.) 397; Agar-Ellis v. Lascelles, *Irish Law Times*, July 25, 1883; *In re* Browne, 2 Ir. Ch. Rep. 151; *In re* Meades, Ir. Rep. 5 Eq. 98; *In re* Plomley, 47 L. T. N. S. 283; Chapsky v. Wood, 26 Kan. 640; 13 Cent. L. J. 494; *In re* Scarritt, Alb. L. J. Aug. 25, 1883.

follow.[3] He is entitled, during the minority of the child, to his services,[4] or his wages,[5] and no one can induce him to leave his father's home, or can interfere with the parental authority, without subjecting himself to an action by the injured parent. He may exact rigid obedience to his wishes, and enforce his authority by moderate castigation,[6] and, in the event of utter rebelliousness, it is his privilege to turn him out upon the world, to depend upon his own resources, or to trust to the charity of strangers.[7] It is proper to remember the limited liability of the parent in this country for the maintenance of his child, and that in England it has been held, that a father is bound, in no case, to maintain his children, and, in cases of neglect, is responsible only to such Overseers of the Poor as officially minister to the wants of the child.[8]

It is important to notice that whenever it becomes the good fortune of a child to fall heir to property of any nature, his parent has no right to assume any dominion over it, or to appropriate it to his own use.[9] The dominion of the parent stops at the appropriation of the earnings of the child; he has no right to disturb the fruits of the labor of others. He is so powerless, that he cannot reimburse himself even for the child's support,[10] though the child be enormously rich and he as poor.

In this place, it may be proper to state that a husband, by the connection which he forms by marriage with his wife, assumes the responsibility for all her torts.[11] Why, it is asked, should a father be held responsible for the misdeeds of his wife, and be exempt from liability for those of the children which are the fruits of that very connection which renders him responsible as husband? The answer is plain. By marriage, the husband takes all the property of the wife, the personalty absolutely[12] and the realty for life.[13] She has no means of responding to a judgment against her, and he who has brought about this condition of things is answerable for the consequences. A parent has no such rights, as we have seen. He would, in no event, have a fund of indemnity. But, it is said, this distinction is based upon the presumption that women always bring their husbands property, and that there is no such presumption in law. To this we reply, that the law, in respect to married women, is long settled, and it is now too late to question its logic or justice.[14]

The question under consideration first arose in New Jersey, in a case decided in 1809.[15] The defendant was sued for trespasses committed by her two sons. The lower court gave judgment against her, but, on error, the judgment was reversed. "The state of the demand," said the court, in its opinion, "is for a trespass committed by the sons of the defendant. Upon principles of law, one person can never be made liable for the trespasses of another. It is true, that if one commands or authorizes his servant to commit a trespass, he is answerable himself; but then it is the trespass of the master, according to the well-known maxim of the law, *qui facit per alium, facit per se.*"

Next, in order, is the case of Tifft v. Tifft.[16] The misfortunes of the parties in this case lay in the plaintiff's ownership of a swine, and the defendant's ownership of a dog and a mischievous daughter. The latter one day took a notion that the swine was in her way, and saw no more expeditious method of ridding the world of its presence, than by taking

[3] Agar-Ellis v. Lascelles, *Irish Law Times*, July 25, 1883; *Re* Brown, 2 Ir. Ch. Rep. 151; *Re* Meades, Ir. Rep. 5 Eq. 98.

[4] Day v. Everett, 7 Mass. 145; Benson v. Remington, 2 Mass. 113; Plummer v. Webb, 4 Mason, 380; Gale v. Parrott, 1 N. H. 28; Nightingale v. Wethington, 15 Mass. 272; The Ætna, Ware, 462.

[5] Duffield v. Cross, 12 Ill. 39; Shute v. Dow, 5 Wend. 204; Hollingsworth v. Swedenberg, 49 Ind. 378.

[6] Gorman v. State, 42 Tex. 221; State v. Alford, 68 N. C. 221.

[7] Angell v. McLellan, 16 Mass. 27.

[8] Mortimer v. Wright, 6 M. & W. 482; See Shelton v. Springett, 11 C. B. 452; 20 E. L. & Eq. 281; Seaborn v. Meddy, 9 C. & P. 497.

[9] Keeler v. Fossett, 21 Vt. 539; Jackson v. Combs, 7 Cow. 36; Miles v. Boynton, 3 Pick. 213; 97 Mass. 434.

[10] Wellesby v. Beaufort, 2 Russell, 28; Butler v. Butler, 3 Atk. 60; Conger v. Heyward, 2 Desaus, 94; Addison v. Bowie, 2 Bland, 606.

[11] Angel v. Felton, 8 Johns. 149; Gage v. Reed, 15 Ill. 403, and cases cited in Schouler on Domestic Relations, 75, note 3.

[12] Campbell v. Galbreath, 12 Bush, 459; Russell v. Brooks, 7 Pick. 65; Schouler on Domestic Relations, 81.

[13] See Schouler's Domestic Relations (3d ed.), 789.

[14] It may be proper here to state in justice to the other side, that the Supreme Court of Pennsylvania has held that a husband is still liable for his wife's torts, notwithstanding the Separate Property Acts relating to married women. Quick v. Miller, 14 W. N. C. 1.

[15] 1 Penn. 86.

[16] 4 Denio, 175.

the dog into her confidence and using him to further her ends. This the dog readily assented to, and the two started towards the plaintiff's field, having only the death of the swine in view. It was soon attacked by the dog, the girl urging him on, and the swine received wounds from the effects of which he died. The defendant knew nothing of these proceedings; but this made no difference to the plaintiff, who sued him for the loss by him incurred. The Supreme Court of New York denied his claim, Bronson, C. J., saying: "The defendant was not answerable for the act of his daughter, done in his absence, and without his authority or approval; but the daughter, whether an infant or not, was responsible for her own trespass."

The next time we find a child causing his father trouble, was in Missouri.[17] The defendant's son, desiring to furnish some surgeon with employment, made a furious assault upon the plaintiff with a knife, not desisting until he had attained his object; the consequences of all which were that the plaintiff's purse became considerably lighter, and that he lost his employment. He naturally appealed to the defendant for reimbursement, but, his appeal being futile, he brought suit against him. The "blind lady's" heart was also hard, and he was obliged to withdraw without consolation. One of the humorous features of this case was the ruling of the court below, that, "unless the plaintiff has established that the boy was of a vicious disposition and habits, and that the father knew it at the time, he is not responsible for the injury sustained, and the jury will find for the defendant." The upper court condemned such a distinction and denied the existence of any analogy between domesticated animals and children. Such an analogy is entirely repugnant to our ideas of the moral supremacy of man. The trial judge did not suggest what course should be pursued by the parents of vicious children, to put an end to their responsibility for their misdoings, but left us to infer that the same modes of restraint should be employed as in cases of other vicious animals. The appellate court, however, happily relieved us of this difficulty.

The next case which has come to our notice was one where an Englishman was the victim.[18] He was the property clerk at the defendant's theatre in London, and the latter's son was in charge of the treasury. A dispute arose between the parties to this action as to the correctness of an account rendered by the plaintiff of his disbursements; but the outcome of it was that both parties yielded something, and the matter was peaceably adjusted. The young treasurer, feeling his pride injured by his father's failure to gain all he wanted, and, being over-zealous in the latter's behalf, procured the arrest and imprisonment of the plaintiff upon some groundless charge. This proceeding was immediately brought to the attention of the defendant, who declined to interfere in the plaintiff's behalf, saying that, "as his son had begun it, he would see it out." The plaintiff brought this action for false imprisonment, claiming satisfaction on two grounds: First, on the general liability of a father for the misdoings of his children; secondly, on the alleged ratification of the act of his son, after he had notice of the same. The court refused to entertain either proposition, denying any common law responsibility for the acts of minor children, as well as any conduct on the part of the defendant amounting to an adoption of his son's act. "I am not aware," said Willis, J., in delivering the opinion of the court, "of any such relation between a father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of anybody else. I apprehend that when it is established that a father is not liable for contracts made by his son within age, except for necessaries, it would be going against the whole tenor of the law, to hold him liable for the son's trespasses. The tendency of juries, where persons under age have committed wrongs, to make their relations pay, should, in my opinion, be checked."

The next case of puerile mischievousness comes to us from Kansas.[19] The plaintiff was the owner of a beautiful orchard and a long rail fence; but awoke one fine morning in October, 1872, to find both the orchard and fence consumed by fire. Upon investigation, he traced his misfortune to the defendant's son. As the defendant "was re-

[17] Baker v. Haldeman, 24 Mo. 219.

[18] Mone v. Towers, 8 C. B. (N. S.) 617.

[19] Edwards v. Krunie, 13 Kan. 348.

sponsible for the existence" of the boy, the plaintiff naturally thought the defendant should make good his loss. The Supreme Court, however, thought otherwise. "The main question in this case," said Valentine, J., for the court, "is whether a father is liable in a civil action for damages for the wrongful act of his minor son, when the son lives with his father and is under his control, but where the acts complained of were not authorized by the father, were not done in his presence, had no connection with his business, were not ratified by him, and from which his father received no benefit. We must answer this question in the negative. The father in such a case is not liable." And to illustrate the dangerous consequences which would follow a contrary doctrine, he adds: "Suppose a minor son, fifteen or twenty years old, should steal a horse or rob a bank and abscond with the proceeds of his larceny, does any one suppose that the father would have to answer therefor either civilly or criminally?"

In Illinois,[20] the children of the defendant used the plaintiff's land as a convenient passageway to their school, and availed themselves of the opportunities they thereby gained to worry and maltreat the plaintiff's hogs. He sought relief from their father's fortune, but failed. "A father," said the court, "is not liable for the torts of his children, committed by them without his knowledge or consent and not in the course of their employ". In a subsequent case[21], brought for worrying the plaintiffs swine with a dog, the same court reasserted the doctrine established in the last case, saying: "A father is not, nor can be, held responsible for the unauthorized trespasses of his minor children. In that respect, the child occupies the same relation to the father as does a servant. He is liable for the acts of either, when performed under his directions, or in the course of their general employment, but not for their trespasses commited independent of their employment".

Some Texas mules brought about the next case.[22] The sons of one Chandler used them for targets in the trial of their skill as marksmen. The owner was naturally offended, and brought this action against Chandler for the value of the animals. The court, however, held him not liable. "There is no presumption" said the court, (*per* Walker, J.,) "growing out of the domestic relation of parent and child, which would hold the father responsible for a crime or tort, committed by his minor child, unless it can be shown that the father is himself in some way implicated as principal or accessory". The court suggested the query whether the concealment by the father of the child's guilt, would not render him liable in a criminal prosecution, as accessory after the fact, and whether in a civil action, it would not amount to a ratification of the act. While no case has come under our notice, in which a father has been held criminally liable for such conduct, yet in the analagous case of husband and wife, it has been repeatedly held, that a wife is so far under the protection of her partner, that the latter can under no circumstances, be held responsible for harboring his guilty wife and concealing her crimes. If a father can go so far in covering up the misdeeds of his wife, upon principle, should he not have far greater immunity in the protection of his own children? Would it not be revolting in the highest degree, if a father could not throw the mantle of security around the objects of his affection when they are charged with crime, when the law itself presumes them to be innocent until proved to be guilty. The same reasoning might apply to the civil remedy. Why should a father reveal the misdeeds of his children when he becomes cognizant of them? What duty is incumbent upon him to become "informer" upon his own children? Are not his duties to them paramount to every other consideration? We fail to see any argument why such concealment should operate to his disadvantage.

Under the Roman law,[23] when a child or slave committed a wrong, the father or master had the choice of two remedies; the surrender of the culprit to the injured party, as a sacrifice, or the payment of the damages. This, of course, is wholly repugnant to our institutions, and deserves no notice, except to point out the barbarism which prevailed under that law. In France,[24] under the code, any

[20] Wilson v. Garrard, 59 Ill. 51.
[21] Paulin v. Hosmer; 63 Ill. 321.
[22] Chandler v. Denton. 37 Tex. 416.

[23] Noxalis actio, Justinian's Institutes, by Saunders lib. 4, tit. 8.
[24] Civil Code, art. 1384.

person, who has control over a minor is responsible for his misdoings; but this responsibility proceeds upon the assumption that he might have prevented the wrong, and should be punished for his neglect. This view of the law has obtained in Louisiana,[25] where the French code and the civil law are followed; and the apparent inconsistency between the law of that state, and the decisions of the courts of other states may be thus explained.

There is a case in Pennsylvania,[26] which according to Professor Schouler, in his treatise on Domestic Relations,[27] supports the doctrine that a father is liable when the act complained of is done in his presence. While we do not desire to be understood as denying that such is the law, we do refute his claim to have that case considered as an authority in support of the doctrine. The son, in that case, was driving a team, with the father sitting upon the same seat and giving orders, as he would to any servant, and the case merely decides that a master is liable for the unauthorized acts of his servant, when done in his presence.[28] Any further deduction from the case is unwarranted.

As the general question may be considered as still debatable in a large majority of the states, it may not be out of place to make a few illustrations of the consequences which would follow the enunciation of a different doctrine. A son, who has no authority to pledge the credit of his father for the hire of a horse and carriage, might obtain them, upon his own responsibility, and so injure both as to make his father responsible for the whole value of the property. A child, having no authority to purchase goods upon his parent's responsibility, would only be required to commit larceny to obtain the desired articles and thus fix the father's liability for their value, and enable the dealer to make a practical sale. So a son under the same difficulty, might falsely represent himself to be of age, to procure the goods upon his own credit, and render his father responsible for the fraud in an action of deceit. So, he might for the purpose of obtaining money, which he has no authority to borrow, make an assault upon a stranger, commit robbery, obtain what he desires, and compel his victim to look for redress to the guiltless parent and obtain it. These are extreme cases, it may be claimed; but it is only by the application of extreme cases, that the absurdity of a doctrine can be exposed. The fortunes of parents would be entirely at the mercy of their children; and there would be no end to the dangers of connivance with rebellious children to bankrupt their parents. The idea that children are provided with a weapon so dangerous to those who have nurtured them, seems to be too absurd to deserve notice.

"For every wrong, there is a remedy", it has been said, and it is true of this question. Every one is held responsible for his own acts, regardless of sex, age, or condition of mind. The property rights of every one are sacred; every infraction of them renders the disturber liable. It may be said that, as a general rule, minors possess no property, and that, therefore to pursue them, would be futile. But it has always been the policy of the law to entirely ignore the question of wealth or poverty, in determining the law. Such questions have no influence upon the judicial mind. If the culprits are impecunious, let the plaintiffs bide their time until the former become responsible. If the statutes of limitations do not save them their legal remedies, then the legislatures should be appealed to, to supply what is necessary.

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[25] Cleveland v. Mayo, 19 La. 414; Governor Lambeth, 9 La. 241.
[26] Strohl v. Levan, 39 Pa. St. 177.
[27] 3d edition, 263.
[28] The court throughout its opinion treated, the question entirely as a question relating to the law governing master and servant.

MISTAKES OF LAW.

The article of Mr. Joyce in a recent number[1] of the CENTRAL LAW JOURNAL on Ignorance of Law, was read by the writer with pleasure. The subject is therein shown to be involved in inextricable confusion, uncertainties and contradiction, but no attempt is made to deduce from the books and cases, some rules which would serve to guide the practitioner in determining in advance whether relief in a particular case would be granted or withheld. We admit that it is utterly impossible to reconcile all the cases. Judge Pomeroy

[1] Vol. 17, 422.

in his new work on Equity Jurisprudence, thought he had found a formula upon which most of the cases, relating to mistakes of law could be reconciled; but his formula, when analyzed, is found to be but a jugglery of terms—a calling a thing by one name for one purpose, and by a different name for another purpose.

The maxim, *ignorantia juris non excusat*, is embodied in all human codes. If an individual could escape or vary his obligations or liabilities by showing that in consequence of his ignorance of the law of the land, he had not correctly apprehended the legal nature and effect of an act or transaction, at the time he was engaged in performing it, there would be no common ground on which persons could meet for the transaction of the affairs of life; and, as the liability of each individual would depend upon his intelligence, the court would have to determine the extent of his knowledge or ignorance before it could have any standard by which to judge his actions. As parties possessing different degrees of intelligence would engage in transactions with each other, different standards would have to be adopted for each individual. Two or more individuals, who should engage in the same act or obligations would be bound to different degrees of responsibility, if they differ in intelligence. The individual could be held only to his own conception of the duties and liabilities flowing from his conduct. The result of this would be to loosen or discharge the obligations of the ignorant. "There could be no security in legal rights, no certainty in judicial investigations, no finality in litigations." All would be at sea without rudder or compass. Dense ignorance alone would be at a premium. Hence there arose a necessity for some standard by which the rights, duties and responsibilities of the various members of a community could be measured and adjusted. That standard was obtained by assuming that each member of the community, having a sound and mature mind, knows the law of the country in which he dwells or does business.

Having deduced a rule of decision, a standard by which to measure rights and duties, the next question that arose was as to what exceptions, if any, should be allowed to it. As the rule was not one of convenience merely, but was adopted because it was an absolute necessity, and offered the only basis in which a community could exist in an orderly manner, all exceptions were admissible that did not tend directly to subvert or destroy the rule; and no exception should have been allowed that had a direct tendency to undermine and overthrow it.

Some of the courts seem not to have observed the fundamental character of this rule, but treating it as a rule of convenience only, have granted relief against mistakes of law in the very teeth of the rule—the consequence of which has been to introduce confusion and create doubt as to whether there exists any such rule or whether each case is not to be determined on its peculiar facts, and relief awarded or refused in the discretion of the court. While too many courts, in particular instances have gone astray for the public good and the certainty of the law, yet in most of the cases the courts have steadily adhered to the true principle, and declared that a mistake of law, pure and simple, was not adequate ground for relief.[2]

Ignorance of the legal effect of an instrument which a party, who understands its terms executes, or as to the legal effect of an act he is engaged in performing is a mistake of law, pure and simple, and affords no grounds for relief.[3] But where parties have made an agreement which they attempt to reduce to writing, and while reducing it to writing, the instrument, through some mistake of law, fails to express the contract actually made, relief may consistently with the rule be granted. In such case there would be no mistake as to the legal import and effect of the contract actually made. The mistake merely prevents the real contract from being embodied in the more certain form of a written agreement. In enforcing the contract actually made, and in refusing to allow the mistake to defeat it, there would be no violation of the general rule.[4]

[2] Snell v. Ins. Co. 98 U. S. 85; Williams v. Hitner, 79 Ind. 233; Easter v. Severin, 78 Id. 233; Harris v. Smith, 40 Mich. 453; Gebb v. Rose, 40 Md. 387; Moorman v. Collier, 31 Iowa, 138; Dailey v. Jessup, 72 Mo. 144; Griffith v. Towsley, 69 Id. 13; S. C. 33 Am. Rep. 476; Moran v. McCarty, 75 N. Y. 25.

[3] Toops v. Snyder, 70 Ind. 554; Paine v. Jones, 75 N. Y. 593; Harris v. Smith, 10 Mich. 453; Gerald v. Elley, 45 Iowa, 322; Robertson v. Welker, 51 Ala. 484; Clark v. Hart, 57 Ala. 390; Sparks v. Pitman 51 Miss., 511; Nelson v. Davis, 40 Ind. 366; Lanning v. Carpenter, 48 N. Y. 408; Zane v. Cawley, 21 N. J. Eq. 130; Pomeroy's Equity, § 843.

[4] Stockbridge v. Iron Co., 107 Mass. 290; Lanning v. Carpenter, *supra*; Pomeroy's Eq. sec. 845; German

It has been intimated in some cases that where there has been a mutual mistake of law, that is, where all the parties to the contract or transaction, labored under the same misapprehension of the law, this created an exception to the general rule, and that relief should be granted.[5] No well founded reason can be discovered for the allowance of such an exception. On the contrary, it seems opposed to sound principle. It is a recognized principle of jurisprudence, that a complainant must recover on the strength of his own title, not on the weakness of his adversary's. How then can a supposed defect in the title of his adversary furnish ground for relief where he would otherwise have none? If neither standing alone has adequate ground for relief, it is difficult to understand how, when they are adversely opposed, they strengthen each other. As weak as they may be, instead of strengthening each other, they would have the contrary effect. Judge Pomeroy says that the case of Cooper v. Phibbs, does not sustain, but is opposed to the doctrine stated by Mr. Kerr, and that the exception is not sustained by the authorities.[6]

One universally recognized exception to the general rule is where the party seeking relief from a mistake of law, was misled as to the law of the transaction, by the false statements of the other party. As a court of equity will not permit a party to profit by his own wrongdoing, nor to obtain a reward as the result of his fraudulent practices, it will allow relief against a mistake which is so brought about; nor is the granting of relief in such cases a violation of the rule, as the fraud furnishes adequate ground for interposing independent of the alleged mistake of law.[7] But, if the plaintiff is misled as to the law of the transaction by the statements of persons other than the defendant or his agents, there is no ground for equitable interposition, except the mistake of law, and relief should be denied.[8]

Whenever there is in the transaction, independent of the mistake of law, other grounds for equitable interposition, such as mistake of fact or fraudulent conduct, and such other grounds of themselves would justify the granting of relief, relief may be granted consistently with the rule. The fact that the party erred as to the law ought to be no impediment to his title to relief on the other grounds. He should not be compelled to submit to fraudulent practices because he erred as to the law. [9]

In some cases, it has been held that where one party to the transaction was mistaken as to its legal effect, and the other party knew of the mistake but did not correct it, relief should be granted and the party deprived of the advantages and benefits resulting from such mistake. Failing to inform the other party as to his error of law is regarded as a species of fraud which renders it inequitable for him to take the fruits of the transaction tainted with such fraud. The principle upon which these cases were decided, was correct and consistent with the rule, provided their was a duty on the party about to be deprived of the advantages of the transaction to correct or disclose. But to afford relief in cases where no such duty existed, where the parties dealt with each other at arms length, seems to be an unwarrantable invasion of the general rule. If there exists between the parties some relation of trust and confidence, or if the transaction in its nature is essentially fiduciary, or if one expressly reposed trust or confidence in the other, then it would be as inconscionable to permit one to take advantage of the other's ignorance of the law as of his ignorance of the value of a bond or the price of cotton. But where the transaction was not between parties occupying fiduciary relations, there would be no equitable grounds for interference independent of the mistake of law, and relief should be denied. The acceptance of the benefits and advantages resulting to him from the mistake of his adversary does not, standing alone,

v. Davis, 131 Mass. 316; Petesche v. Hambach. 48 Wis. 443.

[5] See Kerr on Fraud, etc., 399, citing Cooper v. Phibbs, L. R. 2 App. Cas. 149.

[6] Pomeroy's Eq. sec. 846; See James v. Cutter, 54 Wis. 172.

[7] Berry v. Whitney, 40 Mich. 65; Bales v. Hunt, 77 Ind. 355; Mason v. Pelletier, 82 N. C. 40; Jenkins v. German, 58 Ga. 125; Hardigrave v. Mitchmer, 51 Ala. 151; Montgomery v. Shockley, 37 Iowa, 107; Bayose v. Ins. Co. 4 Daly, 246.

[8] Beall v. McGehee, 57 Ala. 438; Blanchard v. Ware, 37 Iowa, 305; Gamar v. Bird, 57 Barbour, 277; Darling v. Baltimore, 51 Md. 1.

[9] Pomeroy's Equity, sec. 847; Griffith v. Towsley, 69 Mo., 13; Whelan's Appeal, 70, Pa. St. 410.

constitute adequate grounds for relief.[10]

As the rule presupposes that the persons to be affected by it are of sound and mature minds the mistakes of lunatics and infants are not within the rule, or exceptions to it. Hence when a guardian at the time of conveying his ward's estate was mistaken as to the character or extent of his ward's interest in the property, relief may, consistently with the rule, be granted against the effects of the mistake. The mistake of the guardian will not be imputed to the infant; nor ought he to be bound by the mistake of his representative when he would not have been bound by his own.[11]

Mistakes of a party as to his own legal rights, interests and relations has been declared to be an exception to the general rule and to furnish of itself adequate ground for equitable jurisdiction. In Pomeroy's Equity Jurisprudence,[12] the reasons for considering it an exception are stated to be because "a private legal right, title, estate, interest, duty or liability is always a very complex conception. It necessarily depends so much on conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded as in great measure they really are, and may be dealt with, as mistakes of fact."

If relief is to be given where the facts are known because the party misapprehended their legal effects upon his rights, relief ought to be given as against an instrument.

As, consistently with the rule, relief may be granted in all cases when there is such a combination and blending of law and fact as to render it uncertain whether a mistake is in its intrinsic nature, one of law or fact, or of the two combined, no fiction should be indulged which has the effect of opening the doors of relief to cases that are not in principle entitled to it.[13]

In some cases it has been intimated that if a party has mistaken a clear and unquestioned rule of law he would be relieved from the results of the mistake; but if the rule of law which he misunderstood was doubtful and obscure, his ground was not adequate to entitle him to relief. In respect to this alleged exception, what Judge Pomeroy says is so pertinent that we shall content ourselves with quoting it. "In the first place this proposition, if taken as a general rule, is directly opposed to the fundamental principle upon which the entire doctrine concerning mistakes of law is based. The presumption that every person knows the law must necessarily extend to all rules of the law alike. To permit a distinction between rules said to be clear and those claimed to be doubtful, would at once open the door for all the evils in the administration of justice, which the presumption itself is intended to exclude. In the second place the proposition finds no support as a general rule from the decisions of authority".

The same principle applies to compromises and family settlements. Whether the mistake is of a plain or obscure rule of law, in the absence of deceit, mistake of fact, or other equitable grounds, relief ought to be refused.[14]

CROSBY JOHNSON.

Hamilton, Mo.

10 Beall v. McGehee 57 Ala., 438.
11 Baker v. Massey, 51 Iowa, 399.
12 Sec 849.
13 Zollman v. Moore, 21 Gratt. 313; Pasman v. Montague 30 N. J. Eq., 385; Morgan v. Dod 3 Col. 51.
14 De Give v. Healy, 60 Ga. 391.

CONSTRUCTION OF STATUTE—EVIDENCE—ORIGINAL DRAFT—ENTRIES IN JOURNALS OF LEGISLATURE.

CHICOT COUNTY v. DAVIS.

Supreme Court of Arkansas.

In ascertaining the language of a statute, the enrolled act will prevail over the original draft of the law and the entries in the journals kept by the two Houses of the General Assembly.

Appeal from Chicot Circuit Court.

U. M. and G. B. Rose, J. F. Dillon, F. W. Compton and C. P. Rutmorel, for appellant; *John McClure*, for appellee.

SMITH, J., delivered the opinion of the court:

The sole question which we are called upon to decide is, whether the Act of July 23, 1868, authorizing counties to subscribe stock in railroads was duly and constitutionally passed.

The history of this law, as disclosed by the legislative journals, is as follows: The bill was introduced in the House of Representatives on July

17, 1868, and on July 20 it was read a first time The rules were then suspended and the bill was read a second time. Several amendments were adopted,all of which were for the mere purpose of filling blanks except one. On July 21 the bill was by unanimous consent read the third time by title and passed by a vote of 45 to 1: the yeas and nays being entered on the journal. On the same day the bill was transmitted to the Senate,where it received a first reading. Then, under a suspension of the rules, it was read the second and third times and passed by a unanimous vote; the names of those voting in the affirmative and of absentees being noted on the journal.

The bill was afterwards presented to and approved by the Governor, was duly enrolled and deposited among the archives of the State, was published as a law, and has been recognized and acted upon by all departments of the Government ever since. Under its authority, it is said, more than $1,000,000 of bonds have been issued by various counties.

I. It is objected that the bill was not read three times in the House, as required by section 21, article V, Constitution of 1868, because the journal shows the third reading was by title only.

The several stages through which a bill passed in Parliament before it became a law were established by usage. "Before the invention of printing, and when the art of reading was unknown to three-fourths of the deputies of the nation, to supply this deficiency, it was directed that every bill should be read three times in the House. At the present day, those three readings are purely nominal; the clerk confines himself to reading the title and the first words." Bentham Pol. Tac. Works II, 353.

The Constitution provided that every bill should be read three times on different days in each House before the final passage thereof, unless two-thirds of the House where the same is pending should dispense with the rules.

In Smither v. Garth, 33 Ark., 17, the third reading of the bill in the House and the first reading in the Senate were by title only; and although the act was held invalid, it was not for this cause; but it was intimated that in such cases the journal should show a suspension of the rules. The inference is clear that, in the opinion of the court, it was competent for the House, in which a bill was pending, by a vote of the requisite majority, not only to order a second or third reading on the same day, but also to dispense with the reading of the bill by sections.

In English v. Oliver, 28 Ark., 317, a law was assailed because the bill had not been read three times on different days in the House of Representatives, nor had the rules been suspended. The journal failed to show that it had been read a first and second time, but did show a third reading by title. The court sustained the validy of the act upon the ground that a third reading necessarily implies two previous readings. If the proposition now contended for were true, the bill had never been read at all in the House.

In Worthen v. Badgett, 32 Ark., 496, the last two readings in the Senate of the bill for the Act of April 29, 1883, were by the title, and yet the Act was sustained.

So that it is no longer an open question that, under the Constitution of 1868, bills might be read by title under a suspension of the rules. The rule is probably different under the Constitution of 1874, which requires bills to be read at length. Art. V, sec. 22.

II. But it is further contended that, supposing the bill might have been read by the title under under a suspension of the rules, yet the rules were never actually suspended.

As the greater contains the less, unanimous consent is probably equivalent to a suspension of the rules, or implies it. But if this be not so, the Coustitution under which this legislature was held, did not require the journal affirmatively to show a suspension of the rules. And for the purpose of upholding a law which appears upon the statute book, we will presume this was done. Vinsent v. Knox, 27 Ark. 278; English v. Oliver, 28 Id. 320; Worthen v. Badgett, 32 Id. 513.

III A third objection was, that the bill was read for the first time in the Senate on the same day that it passed the House, without a suspension of the rules.

The Constitution does not mean that a bill cannot be read in both Houses on the same day unless the rules are suspended. The design of all such restrictions is to prevent hasty and improvident legislation, by giving members time to inform themselves about measures pending before them. Nothing could be gained by having a day to intervene between the passage of an act in one House and its first reading in the other. It would have passed from the consideration of the House in which it originated, and it would not be before the other House at all, until it had been once read.

Such a construction presupposes a knowledge, by the members of either House of the proceedings in the other, which, in the nature of things, it is not to be expected that they should possess. In the matter of the several readings, each House acts independently of, and without reference to the other. But the point has perhaps already been settled by State v. Crawford, 35 Ark. 237, when the bill, it seems, was pending in both Houses on the same day.

IV. The fourth proposition is, that the bill, approved by the Governor, and enrolled in the office of the Secretary of State, differs from the bill which passed the General Assembly. The alleged variance consists in this: the original draft of the bill, and the bill as it was enrolled and approved by the Governor, provided that the county court should submit the question of subscription to a popular vote, upon the joint application of the

president and directors of the railroad company, and one hundred voters of the county. It is claimed that an amendment in the House, substituting "or" for "and" authorized the election to be ordered upon the petition either of the railroad company or of one hundred voters. This variance can be detected only by a comparison of the original draft, and the journal of the House with the enrolled act.

It is contended, in support of the act, that the enrollment is conclusive, and that the courts cannot go behind it to the journals, or the original draft, for the purpose of examining into the contents of a bill or the passage of a law.

This is certainly the rule in England. The oldest case on the subject, which we have been able to find, is King v. Arundel, Hobart's Rep. 109, decided in 1616. There it was sought to get rid of a private Act of Parliament, which had the King's assent and the great seal, because it was not the Act of the Lords and Commons. At the trial in the court of chancery, it was proposed to show by the journal of the Lords, that a *proviso* had been passed as a part of the bill. The question thus arose on the admissibility of the journals to impeach the Act. The court examined the journals, and would not find that the Act had been passed by both Houses, and said: "But, now, supposing that the journals were every way full and perfect, yet it had no power to satisfy, destroy, or even weaken the Act, which being a high record, must be tried only by itself *teste me ipso*. Now, journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity, neither have they always been. They are like dockets of the pronotaries, or the particular to the King's patents." And so it was held that the courts could not go behind the authentication of the Act.

This case, it is believed, has never been departed from in England, and it has been followed by the courts of last resort in many of the United States. Eld v. Gorham, 20 Conn. 8; Green v. Miller, 32 Miss. 654; Swan v. Buck, 40 Miss. 269; Pacific R. Co. v. Governor, 23 Mo. 362; Duncombe v. Prindle, 12 Iowa, 1; State v. Young, 32 N. J. Law, 29; Spur v. Plank Road Co., 22 Penn. St. 376; Evans v. Browne, 30 Ind. 514; Sherman v. Story, 30 Cal. 253; State v. Burt, 43 Cal. 560; Broadrax v. Groom, 64 N. C. 244; People v. Devlin, 33 N. Y. 269; People v. Commissioners, etc., 54 N. Y. 276; Fouke v. Fleming, 13 Md. 412; Mayor v. Harwood, 32 Md. 471; State v. Swift, 10 Nev. 176; Louisiana State Lottery v. Richaux, 23 La. Ann. 743. But in some of these States, there have been oscillations of opinion on this vexed question, the effect at least in part of change of organic law. Brady v. West, 50 Miss. 68; State v. McBride, 4 Mo. 303; Bradley v. West, 60 Mo. 33; State v. Meade, 71 Mo. 266; People v. Purdy, 2 Hill 31 and 4 Hill, 384; DeBow v. People, 1 Denio, 9; Commercial Bank v. Sparrow, 2 Den. 97; Thomas v. Dakin, 22 Ward. 103; Hunt v. Van Alstyne, 25 Wend. 605; People v. Supervisors, 8 N. Y. 317; Berry v. Baltimore R. Co. 41 Md. 446; Legg v. Annapolis, 42 Md. 203; South Bank v. Commonwealth, 26 Pa. St. 446.

The people of England have no written Constitution defining and limiting the powers of their government. The Parliament being supreme, there can be no such thing as the passage of laws in an unconstitutional manner. And the English rule is the safer in the absence of constitutional restraints upon the legislature in the mode of enacting laws. But to apply it in States whose Constitutions contain minute directions about the formalities to be observed in the passage of laws, is to nullify provisions which were intended as safeguards against reckless and vicious legislation, however illusory such protection may prove to be. Thus the Constitution of 1868 ordains "Each House shall keep a journal of its proceedings and publish the same," etc. "No bill * * * * shall become a law without the concurrence of a majority of all the members voting. On the final passage of all bills, the vote shall be taken by yeas and nays, and entered on the journal." "No Act shall embrace more than one subject, which shall be embraced in its title." "No new bill shall be introduced into either House during the last three days of the session, without the unanimous consent of the House in which it originated." Art. V., secs. 16, 21, 22, 24.

Now, since the fundamental law declared that certain formal rules should be complied with before it becomes a law, and the appropriate office of the journal is to record the successive steps of legislative action, the inference is irresistible that this journal is evidence. Accordingly, in a majority of the statutes, where these new fundamental requirements have been introduced, the possibility of overturning the statute roll by the journal exists. Spangler v. Jacoby, 14 Ill. 297; Prescott v. Canal Co., 19 Id. 324; People v. Starns, 35 Id. 121; Ryan v. Lynch, 68 Id 160; Miller v. Goodwin, 70 Id. 659; South Ottawa v. Perkins, 94 U. S. 260; Trustees v. McCoughey, 2 Ohio St. 152; Fordyce v. Godman, 20 Id. 1; James v. Hutchison, 43 Ala. 721; Moody v. State, 48 Ala. 115; Ashborn v. Staley, 5 W. Va. 85; Opinion of the Justices, 35 N. H. 579, and 52 N. H. 622; State v. Platt, 2 S. C. 150; Green v. Graves, 1 Doug. (Mich.) 351; Hurlburt v. Britain, 2 Doug. 191; People v. Mahoney, 13 Mich. 481; Supervisors v. Heenan, 2 Minn. 330; Commissioners v. Higginbotham, 17 Kan. 72; Hall v. Miller, 4 Neb. 505; Cottrell v. State, 9 Neb. 125. This last has always been the rule in this State. Burr v. Ross, 19 Ark. 250; English v. Oliver. 28 Id. 321; Knox v. Vinsant, 27 Id. 278; State v. L. R. M. & T. R. Co., 31 Id. 716; Worthen v. Badgett, 32 Id. 516; Smithee v. Garth, 33 Id. 17; State v. Crawford. 35 Id. 237.

But, at all events, it is urged that we can not go behind the journals for the purpose of examining the draft of the bill. In Loftin v. Watson 32 Ark, 414, and in Haney v. State, 34 Ark. 263 this court did examine the original bills introduced into the legislature. The true rule upon

this subject was enunciated in Gardner v. Collector, 6 Wall. 499: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." In that case, only the date of the President's approval of the Act of Congress was in question. In Scott v. Clark Co., 34 Ark. 283, this rule was followed by this court.

The enrollment is a solemn record, and the existence of the Act is to be tried by the record, and is not to depend on the uncertainty of parol proof, or upon anything extrinsic to the law and the authenticated recorded proceedings in passing it. But the enrolled Act is not the only record in the case. The inquiry may be carried back to the legislative journals and the records and files of the Secretary of State. In the matter of Wellman, 20 Vt. 656, the original draft of the bill comes before us certified by its proper custodian. Sec. 2731 of Gantt's Dig. provides: "The Secretary of State shall receive from the Secretary of the Senate and Clerk of the House of Representatives, the records, books, papers and rolls of the General Assembly, and file the same as records of his office."

Sec. 2450: "Copies of any Act, resolution or order of the General Assembly, commissions or other official acts of the Governor, and of all rolls, records, documents, papers, bonds and recognizances deposited in the office of the Secretary of State, and required by law there to be kept, certified under his hand and seal of office, shall be received in evidence in the same manner and with like effect, as to the original."

Section 2 of the original draft of the bill read thus: "Whenever the president and directors of any such railroad shall make application to the county court of any county for a subscription by such county to its stock, specifying the amount to be subscribed, and the conditions of such subscription, and ——— of the voters of the county shall petition the court for such purpose, etc." The only word on the tenth line was the word "and;" the remainder of the line being blank, which was afterwards filled by an amendment inserting the words "one hundred," before the words "of the voters." It also appears from the manuscript journal that the House adopted this amendment: "Sec. 2, line 10, add the word 'or' instead of 'and.'" The published journal, at the same place in the proceedings, read: "Annex the word 'or.'" This last reading is totally insensible, as it does not show that "and" was stricken out, and there is nothing on line 10 to which "or" can with any propriety be annexed. However, the manuscript minutes are a higher grade of evidence than the printed copy, and must control. They show with reasonable certainty that the House amended the bill, by striking out "and" and inserting "or." Does it follow that the bill which passed the General Assembly was not the same bill which was presented to and signed by the Governor?

In Cooley's Constitutional Limitations, 135, it is said: "Each House keeps a journal of its proceedings, which is a public record of which the courts are at liberty to take judicial notice. If it should appear that any Act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the Constitution, or that in any other respect the Act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void. But whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the journals, that either House has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the Constitution has expressly required the journals to show the action taken, as for instance, where it requires the yeas and nays to be entered." This presumption in favor of the one passage of laws was acted upon in regard to the three readings of a bill in Vincent v. Knox, 27 Ark. 278, which has been followed in several other cases, as we have seen. Now, the Constitution of 1868 did not require amendments to bills to be entered on the journals. Consequently, in order to uphold the Act, we will presume that the House receded from its amendment, substituting "or" for "and."

Equally liberal presumptions have been indulged by other courts. Blessing v. Galveston, 42 Texas, 641; Miller v. State, 3 Ohio St. 475; McCullough v. State, 11 Ind. 433; Supervisors v. People, 25 Ill. 182; Commissioners v. Higginbotham, 17 Kas. 62. While the journals furnish evidence of the legislative proceedings, so far as they go, yet courts are not bound to hold that nothing was done, except what appears therein. Their silence is conclusive only in those matters where the Constitution requires them affirmatively to show the action taken. It is notorious that these journals are loosely kept, and their entries often unintelligible; that they are constructed out of hasty memoranda, made in the pressure of business and amid the distraction of a numerous assembly; that the reading of them each morning, is frequently dispensed with, and there is not a single guaranty of their accuracy or their truth, which is not in practice usually ignored. Nobody vouches for them, and upon final passage of a bill, they are not searched to know whether they contain enough to insure the law's validity. On their value as evidence, see 13 Cent. L. J. 181. The enrolled statute, on the contrary, has many guaranties for its correctness. It is enrolled under

the supervision of committees of both Houses, composed of members who are conversant with the proceedings of their respective bodies, and whose duty it is to compare it with the engrossed bill, the original draft and the journals. We believe also, that it has been the invariable practice in this State, for the President of the Senate and the Speaker of the House to sign the same. It is then laid before the Governor, and if he approves it, is deposited with the Secretary of State, and becomes a high and sacred record.

To make all legislation ultimately depend on the fidelity with which a journal clerk has made his entries, is, in the language of Judge Black, in Thompson's case, 9 Opinions of Attorneys-General, 1, to render the laws as uncertain as the terms of a horse trade. We fear to turn loose a principle which might devour the whole statute book.

The judgment of the Chicot Circuit Court, quashing the levy of the county court to pay interest on the bonds issued under this Act, is reversed and the cause remanded with directions to dismiss the petition for the writ of *certiorari*.

COMMON CARRIER—SLEEPING CAR COMPANY—LIABILITY FOR LOSS OF PASSENGER'S PROPERTY.

PULLMAN PALACE CAR CO. V. GARDNER.

Supreme Court of Pennsylvania, Nov. 12, 1883.

1. It is the duty of a sleeping car company to use reasonable and ordinary care to prevent intruding, picking pockets and carrying off the clothes of passengers while asleep, and whether such care was exercised under the circumstances is a question for the jury.

2. Where the regulations require a watchman to stay in the aisle of the car continuously until danger is over, and he go out of the aisle even for a very few minutes, and during that time a robbery occurs, and the jury believe that if he had been in his place of observation it would not have occurred without detection, the company is liable. The watching must be continuous and active.

3. In this action, it was competent to prove that another person was robbed on the same night, and on the same car, as bearing upon the question of negligence.

Error to the Court of Common Pleas No. 1, of Allegheny county.

H. W. Weir, for plaintiff in error; *contra*, *F. W. McCook*.

This was an action on the case to recover damages for the loss of a gold watch and some fifty dollars in money resulting from the alleged negligence of the defendant company, its agents and employees, in not exercising proper care in the protection of plaintiff and his effects while occupying a berth in a Pullman car between Philadelphia and Pittsburgh.

On 8th April, 1881, plaintiff purchased a ticket from the company at Philadelphia which secured him an upper berth in a sleeping coach leaving Philadelphia on the 11:30 P. M. train. There were on this train two sleepers in charge of five employees, the usual number, and consisting of a conductor, one cook and three porters.

The plaintiff, on entering the car, had on his person a gold watch valued at $250 and about $55 in money. His berth was already made up, and he retired shortly after the train started. Before getting into his berth he took off his coat and vest, put his watch and pocket-book in the inside pocket of his vest and put it under the outside corner of the matress of his berth, lay down and was soon asleep, and did not awake until near Huntingdon, about seven o'clock next morning, when the passenger conductor called for his railroad ticket. On looking for it he discovered that his watch and money were gone. He called the porter and sent him to tell the conductor who came, and the plaintiff made known to him that he had been robbed. Officers were telegraphed for and met the train at Tyrone to search the passengers, but the missing property was not found. Two passengers who had taken berths from Philadelphia to Altoona got off at Harrisburg, and from this fact were suspected as being the guilty parties. Every effort was made by the agents and employees of the company to detect the thieves, but of no avail.

The conductor of the sleeper remained on duty in the coach until 3 A. M., when he left his post and put the colored porter upon guard, who went out for a time to black boots. The regulations required a continuous watch during the night.

On the trial the plaintiff offered in evidence a conversation between himself and the porter touching the loss when first discovered, to which defendants' counsel objected as well as to the offering in evidence the deposition of C. C. Darling to prove that he had, on the same night, lost his watch and pocket-book.

The court (Stowe, P. J.,) charged the jury as follows:

The question of law suggested in this case, as you have already heard intimated, is, in many respects, a new one and it gives some indication of how, with the improvements of the age, new questions arise for the courts to settle. When suits for losses in sleeping cars were first brought it was sought to be established that the old doctrine of the liability of inn-keepers and common carriers of of goods applied, that like inn-keepers and common carriers sleeping car companies were insurers. At common law if I gave property to a common carrier he had to deliver it to me perfectly safe and sound as he got it, the acts of God and the king's enemies alone relieving him from so doing. Practically that is all done away with now by bills of lading making exceptions and reservations. So an inn-keeper was an insurer of your property to the same extent. If a mob would break into his house, carry off your trunk, destroy your goods, he was responsible, nothing but lightning, storm or the king's enemies that were in open rebellion, not

simply rioters, but what assumed the dignity of armed rebellion, relieved him from liability. It became very apparent that this doctrine could not be applied to our times and our different circumstances, and the great difficulty has been to find some legal, solid principle on which to base actions of this kind, so that the carrier in this case is the sleeping car company, and you and I, and everybody else who uses sleeping cars should also have reasonable protection. In an ordinary car, upon any railroad, if you or I purchase a ticket, sit down and go to sleep, and somebody picks our pocket, the company is under no sort of obligation to make good our loss. It is bound to carry us safely, so far as our persons are concerned, but it is under no sort of obligation to keep people from robbing us except it would be by an onslaught, open violence on the cars. In such case it has been held that the conductors are bound to protect, not only the persons of passengers, but also their property to a reasonable extent, as, for instance, if some boy, fifteen years of age, with a wooden gun in his hand, would come in to rob a car, as I believe it is said they do out West, and the passengers should crawl under the seats, and the conductor and train hands run away, when, perhaps, if they had stood their grounds they would have prevented it, the railroad company might be responsible if the jury should not find, under the circumstances, that the passengers ought to have defended themselves. We used to ride around in stage coaches, if robbed while in them the company, being under no obligation to carry a guard, was not responsible for the robbery, although you might go to sleep, and they know perfectly well you would go to sleep or ought to suppose you would, for a man could not ride half a dozen days or nights without going to sleep; but in the case of a sleeping car company the great convenience and inducement held out to passengers is, that they will give them a comfortable night's rest. They notify them they will make them pay for it, and say to them you may go to sleep. The principal part of the arrangement is the advantage the passenger will have over ordinary car, that he can lie down and go to sleep. When you have gone to sleep, of course, you can't take care of yourselves, everybody knows that, and for that very reason the fact that the company notifies you to lie down and shut your eyes and go to sleep and thus become helpless, it is their duty to take care of you while you do sleep, not that they are insurers, not that they say you shall not be robbed, or can not be robbed but they will use reasonable and ordinary care to prevent people intruding upon you and picking your pockets or carrying off your clothes while you are asleep. That is the principle that should underlie all of these cases, and it strikes me it is founded on good sense, and good logic. They know that there are certain dangers to the sleeping passengers; their experience, common sense, without that, would say that there were dangers. They know that anybody and everybody, provided they are ordinarily respectable looking, can ride in their cars. They know the possibility of robbery, and they therefore, when they notify you to close your eyes and rest, say : e, we will not say you shall not be robbed, but we will say we will exercise a reasonable and ordinary care to protect you from robbery. Applying that principle you will inquire: Did, or did not this company, at the time this transaction occurred, on this particular car, do its duty, and if so, did the parties it had employed do their duty in guarding the car that night against just such robbery as occurred? We have it in evidence that the company has done its whole duty, as a company. They require a constant watch to be kept, some person in the body of the car where the sleepers are, watching continuously, Mr. Smitley and the conductor both say that. If watch were kept by one I apprehend it would be sufficient.

Of course there are many cases that no protection could guard against. It is apparent that these berths must be made in such a way that the headboards may be easily moved, slipped out; and without you would keep a watchman at every berth there might be some fellow so expert as to be able to move one out and not be detected, just as many thieves can stand right before your face and talk to you and at the same time pick your pocket, and you never suspect it. It is a sleight of hand that seems to be peculiar. Against thefts of that kind the company are not bound to protect you; but they are bound to protect you against such thefts as reasonable care will guard against. In this case, the evidence satisfies me, and it would seem that is the reasonable conclusion from the testimony—that, however, is for the jury—first, that the regulations of this company were reasonable and proper. They kept a guard according to their regulations, and intended to keep a continuous watch, so that a man sitting there could see everything that was going on without interfering with the sleepers. He would have no business to be away except in a special case. They station him at the end of this little aisle where he can see the whole length of the car, see anybody undertaking to crawl from one berth to another, or anybody in the aisle. It is lit up sufficiently to be able to distinguish objects. These Pullman cars seem to have been sufficiently manned. There were five employes altogether. One man seems to me to have been quite enough at a time to guard a car in the way that ordinary care would require it to be guarded. The conductor says he was awake in the car till three o'clock, I believe it was; says he was there continuously and watched continuously. So far, if that is true, he must have done his duty. He left his post of observation or watch, and put the colored porter upon guard. Now, the question for you to determine, if you find that reasonable care was exercised, as I think it was, up to that time is, Did this colored man do his duty? There is no

evidence to indicate that he was not a sufficiently proper man. Therefore the company would not be liable for having employed a man not fit for the purpose. [Did he do his duty? The regulations required h'm to stay in the aisle of the car continuously, to watch there continuously, until the danger was over, until daylight. Did he do it? If so, where is the evidence of it? We have his own declarations that he was on guard, coming from the conductor; but we have also his own declarations to the plaintiff that he went out of that apartment for a time to black a pair of boots or shoes. If he went out of that aisle, even for a very few minutes, and during that time this robbery occurred, and the jury believe that if he had been in his place of observation it would not, and could not have occurred without detection, the company is liable, because he failed to do his duty to that extent that it allowed this robbery to be done. It was his fault and it is visited on the company, although they may have done everything they thought right to get a proper man. "Watching" is not simply to be on watch nominally, it is to be on watch actually, to be there, not under pretense of continuing there; there till you get tired and then go out and lie down or do something else, and let the very thing occur you are put there to avoid; watching must be continuous and active. He could not watch a car full of sleeping people very well if he were in the front part in those little rooms or ante-chambers, or whatever they are called, where people dress and wash.]

The counsel have directed your attention to the principal facts involved in the case. If you think the car was not sufficiently manned at that time, of course you have a right to say so; but if you think, with me, that there were sufficient people there, that one man was sufficient, according to the ordinary practice of the company, and if you believe, as seems to be the case, that the conductor did his duty, then the whole thing turns on what was done after the conductor went off watch, and there you have this evidence, or want of evidence, if you choose. The man that could have told us has not come here. The defendants intimate that they tried to get him, but he didn't come. If they had not shown that they tried to get him the inference would have been against them—that they did not want him here. I think that is fairly rebutted, but that he has not come is a matter for the jury to consider, as to why he did not come. He may not have taken this property, probably he did not, because the indications are that somebody else did—the men who got off under suspicious circumstances—but it would lie, according to the testimony, between those two men and the porter, and whether one or the other did it, if they did it the porter allowed them by his carelessness to do it, or he did it, the company would be liable. I presume there is no pretense, however, that the porter did it.

All of these matters are for the consideration of the jury, the possibilities and probabilities, and you have to take it altogether and render such verdict as you think proper, bearing in mind, of course, the one simple question, whether, at the time the robbery was committed, the employees of the company, this man in particular, who should have been watching, was doing his duty and whole duty. If you find for the plaintiff, the rule of law is that he should only recover for a reasonable luggage, clothing, personal ornaments and a sum of money such as would be ordinarily proper for traveling expenses. He had gone away from home to be gone a week or more, and I think the amount of money—some sixty odd dollars—would not seem to be at all unreasonable. I know I would want as much at least as that if I was going away (and did not intend to spend much), for a week or two; and I think anybody going on business with the expense incident to travel could not very safely leave with less than a hundred dollars or so. That, o course, is for the jury, not for me. He had a gold watch; it was a valuable one, but it would seem to be not of such exceptional value, as to take it out of the ordinary rule. It had been worn about a year, which would somewhat impair its value as a merchantable article, for which there ought to be some deduction, and then he ought to have interest from the time of the robbery till the present time.

Of course, if you think the defendant company did its whole duty, that the watchmen were diligent and attentive, you ought to find for the defendant.

Verdict for plaintiff for $317.80. To this charge defendant excepted, and assigned for error the part of the charge included in brackets, the admisson in evidence of the conversation between plaintiff and the porter and the evidence of other losses on the same night.

We have carefully examined the evidence and considered the assignments of error. Conceding that the company is not liable in this action as an inn-keeper or common carrier; yet a reasonable and proper degree of care is imposed on the company. Whether it did exercise that degree of care, under the circumstances, was for the jury. The main object in taking passage in such a car, is to permit the passenger to sleep. While, in that helpless condition, a duty rests on the company to provide reasonable care and precaution against the valuables of a passenger being stolen from his bed or from the clothes on his person. This is not the case of a robbery by force and violence; but by stealthy larceny. Unless a watchman be kept constantly in view of the center aisle of the car, larceny, from a sleeping passenger, may be committed without the thief being detected in the act. While the fact that another passenger in the same car was robbed the same night, was not relevant to prove that the defendant in error was, in fact, robbed; yet it was admissible as bearing on the absence of

proper care by the company. This case was submitted to the jury in an able and correct charge. We see no error of which the company can complain.

Judgment affirmed.

NOTE.—The principal case seems not to be the first in which a court of last resort has decided the point directly in issue, in which the sleeping car company was the defendant, as apparently the same point arose in Woodruff v. Diehl, S. C. Ind. 15 Cent. L. J. 477.

The question as to the liability of a steamship company for valuables lost by a passenger, while sleeping in his stateroom, arose in Clark v. Burns, 118 Mass. 275, and as to the liability of a sleeping car company in Pullman Sleeping Car Co., 73 Ill. 360, (S. C. 5 Cent. L. J. 54,) S. C. 24 Am. Rep. 258, in both of which no negligence of the defendants was proved, and the court held them not liable as common carriers. In a case which arose in the Superior Court of Indiana, Diehl v. Woodruff, 10 Cent. L. J. 66, the same result was reached as in the principal case. So Smith, J. in a dissenting opinion in Welsh v. Pullman etc. Co. 43 N. Y. (S. C.) 457. See Palmeter v. Wagner, 11 Alb. L. J. 221; See Id. 133, 154; and in Blinn v. Pullman, etc. Co. U. S. C. C. W. D. Tenn. 3 Cent. L. J. 591; So. Pullman etc. Co. v. Smith, 15 Am. L. Reg. 95. But where the railroad company which sold the ticket, which included the right to a berth n the sleeping car, was sued, it was held long ago, in Kinsley v. Lake Shore R. Co., 125 Mass. 54, that such company was responsible for a loss incurred by him, by the neglect of the servants in charge of the sleeping car, and it was no defense that the sleeping car company owned the cars, and placed its own servants in charge of the same, and that the defendant had no control over them, or authority to direct them. And in Pennsylvania R. Co. v. Roy, 102 U. S. 457, where the railroad company was held liable for personal injuries sustained by reason of the falling of the plaintiff's berth, the defendants raised the same defense and it was overruled. The liability of the defendant never extends to anything but the wearing apparel of the plaintiff, and such valuables and sum of money as are reasonably necessary for his purposes as a traveler. Clark v. Burns, *supra*; Kinsley v. Lake Shore R. Co., *supra*; Diehl v. Woodruff, *supra*; Blum v. Pullman, etc. Co., *supra*. See Nevin v. Pullman Palace Car Co., S. C. Ill., 16 Cent. L. J. 301.—[ED. CENT. L. J.]

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY—POWER TO "SELL"—PURCHASER'S LIEN.

Where an agent has a power of attorney to "sell" real estate, he is not authorized under it to make a trade for part money and part something else, and the money thus paid is not a lien upon the land. *Hampton v. Moorhead*, S. C. Iowa, Oct. 17, 1883; 17 N. W. Rep. 102.

2. ATTORNEY AND CLIENT—REMEDY FOR COMPENSATION.

A court will not interfere to enforce in a summary way, through the original suit, the collateral engagement of a client for compensation of his attorney, but will leave him to his common law remedy. *Lannat v. R. Co.* S. C. D. C., Oct. 15, 1883; 11 Wash, L. Rep., 690.

3. COMMON CARRIER—WAREHOUSEMAN—LIABILITY—BILL OF LADING.

A railroad company bears only a warehouseman's liability for freight entrusted to it, until the bills of lading are signed and delivered. *Railroad Co. v. Douglass*, S. C. Texas, Tyler Term, 1883.

4. COVENANT—ASSIGNMENT AFTER BREACH.

A covenant not assignable before breach cannot be assigned after breach so as to vest the right of action in the assignee. *Feebach v. Brunker*, Ky. Ct. App., Oct. 17, 1883.

5. CRIMINAL LAW—ACCOMPLICE—CROSS EXAMINATION.

Where an accomplice testifies for the State, the counsel for the defendant may cross examine him as to his expectations, in regard to his own punishment. *People v. Langtree*, S. C. Cal., Oct. 26, 1883; 12 Pac. C. L. J., 247.

6. CRIMINAL LAW—ALIBI—REASONABLE DOUBT.

The commission of a criminal offense implies the presence of the defendant at the necessary time and place. Proof of an *alibi* is, therefore, as much of a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, nevertheless, with the other facts of the case, raise doubt enough to produce an acquittal. *People v. Tong Ah Sing*, S. C. Cal. Oct. 26, 1883; 12 Pac. C. L. J. 263.

7. CRIMINAL LAW—INDICTMENT FOR MURDER—CONVICTION OF ASSAULT.

In a trial for murder, not charged to have been committed by assault, conviction of an assault is erroneous, and as it operates as an acquittal of the crime charged, the prisoner is entitled to a discharge. *People v. Adams*, S. C. Mich. Oct. 31, 1883; 17 N. W. Rep., 226.

8. DEDICATION OF MORTGAGED LAND TO PUBLIC USE—EFFECT UPON MORTGAGE.

Where a mortgagor with the knowledge of his mortgagee, who made no open objection, dedicated to public use a part of the mortgaged premises, as a street, and the same was used by the inhabitants of the city for ten years, without interference, the mortgagee, whose deed was at the time properly recorded, was not affected by such proceedings, and the purchaser at a foreclosure sale took the absolute title to the strip used for the street, and was justified in closing the same against public use. *McShane v Moberly*, S. C. Mo., Dec. 3, 1883.

9. EJECTMENT—CONTRACT TO SELL—PURCHASER WITH NOTICE.

Where one is in possession of land under an unrecorded written contract to sell and convey, his right in an action of ejectment is superior to that

of a subsequent purchaser who, with actual knowledge of the contract and the possession under it, obtains from the vendor a deed of the property before the deed made in pursuance of the original contract to convey is executed. *McGee v. Taunee*, S. C. D. C. Oct. 15, 1883; 11 Wash. L. Rep., 694.

10. EQUITY — CO-SURETIES—CONTRIBUTION—VOLUNTARY DEED—JUDGMENT.
Where the liability of sureties has been decided by a judgment, the surety who pays the whole debt is entitled to sue in equity for a contribution from the estate of a deceased co-surety, and to have a fraudulent conveyance set aside, without first securing a new judgment. *Rynearson v. Turner*, S. C. Mich. Oct. 31, 1883; 17 N. W. Rep., 219.

11. ESTOPPEL—TAXATION—ILLEGAL ASSESSMENT.
A tax-payer who, as member of the board of supervisors, votes for the levying of a certain tax, cannot be allowed to complain of his own act, and recover the amount by reason of having paid it under protest, on the ground of its illegality. *Wood v. Norwood*, S. C. Mich., Oct. 31, 1883; 17 N. W. Rep. 229.

12. ESTOPPEL—WARRANTY DEED—FRAUD UPON CREDITORS.
A creditor, who makes a sale of his land to his debtor, and executes a warranty deed to the debtor's wife, is estopped afterwards to set up that said deed was made in fraud of the creditors of said debtor. A warrantor will not be permitted to assail a title which he has covenanted to maintain. *Dobbins v. Cruger*, S. C. Ill. Nov. 20, 1883; Reporter's Head Notes.

13. EVIDENCE—DECLARATIONS OF PERSON INJURED—RES GESTAE.
A physician was allowed to testify that he called on the plaintiff sometime after the injury, not professionally, but to transact business, and that he told him that "he had a great deal of pain in his head, and that his neck was hardly able to support his head, unless he could get where he could rest it upon his hand or some object forward of him." *Held*, that the testimony should be taken as though the witness was not a physician; but that it was admissible as referring to his then present condition. *Drew v. Sutton*, S. C. Vt.; Reporter's Advance Sheets.

14. EVIDENCE—OPINION.
Whether or not a sidewalk was an ordinarily good walk is a matter of opinion, and not a proper question to ask a witness. *Hollenbeck v. Marshalltown*, S. C. Iowa, Oct. 18, 1883; 17 N. W. Rep., 155.

15. EVIDENCE—RES INTER ALIOS.
In a suit for commissions against B, he may offer evidence of an arbitration and award obtained by plaintiff against C for the same services, as it tends to show that the services were performed for C. *De Forest v. Butler*, S. C. Iowa, Oct. 19, 1883; 17 N. W. Rep., 178.

16. EXEMPTION—ASSIGNMENT OF EXEMPT PROPERTY.
1. Garnishment process will not reach personal property assigned by the principal debtor, if in his hands it would have been exempt from execution. 2. Creditors cannot attack the transfer of property which the law would not have allowed them to apply on their claims, whether it be real or personal. *Anderson v. Adell*, S. C. Mich. Oct. 17, 1883; 1 Denv. L. J. 332.

17. EXEMPTIONS—PENSION—DEVISE.
Although pension money is exempt in the hands of the pensioner from seizure for his debts, he cannot dispose of it by will to the exclusion of his creditors. *Luthey v. Bacon*, Ky. Ct. App., Oct. 24, 1883.

18. FORFEITURE OF OFFICE—FAILURE TO FILE BOND.
When a statute declares that if a sheriff shall not renew his bond within a specified time, his office shall immediately expire and become vacant, a failure to renew the bond within the prescribed time does not *per se* vacate his office. He is an officer with a defeasible title until the judgment of forfeiture is pronounced in due form, and all his acts prior to such judgment are valid as to the public and third persons. *Clark v. Ennis*, S. C. N. J. 28 Alb. L. J. 451.

19. INSURANCE—BOILER INSPECTION—NEGLIGENCE—INJURY TO THIRD PERSON FROM EXPLOSION.
A boiler insurance company which, after inspection, insures a boiler, is not liable for injuries to a child as an insurer. The plaintiff must prove that the boiler was accorded a greater capacity than it would safely bear, as the result of a negligent inspection. *Bradly v. Boiler Ins. Co.*, U. S. C. C. E. D. Pa. 12 Ins. L. J., 913.

20. INJUNCTION—CONTRACT—RESTRAINT OF TRADE—"VICINITY."
Where a physician agrees in writing, for a valuable consideration, not to practice his profession in a certain city or in its vicinity, he is bound by his contract, and the remedy against him is by injunction. The injunction, however, should be precise, and define exactly what is meant by "in its vicinity." A distance of ten miles from the city limits on every side is suggested as being a proper area in this case. *Timmerman v. Dever*, S. C. Mich. Oct. 31, 1883; 17 N. W. Rep., 230.

21. INSURANCE—FIRE—ADJUSTMENT—FRAUD.
An adjustment by a fire insurance company is final and can be impeached only on the ground of fraud or mistake in a material fact. *Remington v. Ins. Co.*, S. C. R. I.; 12 Ins. L. J., 892.

22. INSURANCE—FIRE—POLICY—"SHALL BECOME VACATED."
Where a renewed fire insurance policy provides that "if the premises shall become vacated or unoccupied" it shall be void, the policy is avoided by the fact that the premises were vacant at the time the renewal was made. *Hotchkiss v. Ins. Co.*, S. C. Wis. Oct. 23, 1883.

23. INSURANCE—FIRE—WHISKEY TAX.
An insurer of whisky is liable for the tax already paid upon it, in case of loss by fire. *Hedges v. Ins. Co.*, U. S. C. C. D. Ky.; 12 Ins. L. J., 926.

24. INSURANCE—LIFE—PAYABLE TO "HEIRS"—DEVISE BY INSURED.
1. Where a policy provides that the heirs of the insured are to take the proceeds of the policy upon his death, he cannot deprive the heirs of the benefits of the fund by devising it to another. 2. But where it appears that the devisee of the policy has saved it from forfeiture by paying some of the premiums on it, she is entitled to be reimbursed therefor out of the proceeds of the policy. *Weisert v. Muehl*, Ky. Ct. App. 5 Ky. L. Rep., 285.

25. JUDGMENT—NOT NEGOTIABLE.
A judgment is not assignable, either at the common law, or under the statute, so as to vest the legal title in the assignee. It is a mere chose in action,

and the assignee takes it subject to all infirmities that existed between the parties to the record. *Dobbins v. Cruger*, S. C. Ill. Nov. 20, 1883; Reporter's Head Notes.

26. LIMITATION—PROBATE—FOREIGN CREDITORS—FEDERAL COURTS.
A foreign creditor is not bound by the limitation of time which a State statute imposes upon the presentment of claims against a decedent, in its county court, but may bring his action against the administrator in the Federal court, subject only to the general statute of limitations. *Hartman v. Fishbeck*, U. S. S. C. E. D. Wis. Oct. 21, 1883; 18 Fed. Rep.

27. MALICIOUS PROSECUTION—PROBABLE CAUSE—CONTINUANCE OF GROUNDLESS SUIT.
Although an action is commenced with probable cause, yet, if the plaintiff therein continues to prosecute it without probable cause, he becomes liable for malicious prosecution. *Stetmore v. Wellinger*, S. C. Iowa, 22 Am. L. Reg., 711.

28. MASTER AND SERVANT—NEGLIGENCE OF EMPLOYER—RISKS OF EMPLOYMENT.
A railroad company is not bound to keep the ground near its track free from ice and snow for its employees, and the danger incident to such a condition of the ground is one of the ordinary risks of a brakeman's employment. *Piquequo v. Railroad Co.*, S. C. Mich., Oct. 31, 1883; 17 N. W. R., 232.

29. MASTER AND SERVANT—NEGLIGENCE PER SE—FELLOW-SERVANT—DEMURRER.
1. It is not *per se* negligence on the part of a railroad company to use upon its road an engine, the draw-bar of which is too short to permit one of its cars to be safely coupled to or detached from such engine. 2. The law requires that the cars, locomotives and appliances used by a railroad company shall be reasonably safe for the uses to which they are put, but they need not all be constructed after the same model. 3. Where it appears from the averment of a complaint that the acts causing personal injury to an employee of a railroad were the acts of a co-employee, a demurrer to the complaint should be sustained. *Whitman v. Railroad Co.*, S. C. Wis., Oct. 23, 1883; 17 N. W. Rep., 124.

30. MORTGAGE—INNOCENT PURCHASER—DURESS.
A mortgage does not possess the incidents of negotiable paper, generally, and an innocent purchaser acquires no better rights than his assignor, to a mortgage obtained by duress, although purchased before maturity. *Bank v. Bryan*, S. C. Iowa, Oct. 18, 1883; 17 N. W. Rep., 165.

31. NEGLIGENCE—DEFECTIVE HIGHWAY—DEFECT OUTSIDE OF TRAVELED PATH.
A town is liable for personal injuries caused by a defect not in the traveled path of a highway, if it is in such close proximity as to render travelling along the way dangerous. *Drew v. Sutton*, S. C. Vt.; Reporter's Advance Sheets.

32. NEGLIGENCE—QUESTION OF FACT.
It is a question of fact for the jury whether, in any particular place, it is negligence for a railroad company to leave combustible material near the track on the ground of the company, liable to be ignited by sparks emitted by engines. *Gibbons v. R. R. Co.* S. C. Wis., Oct. 23, 1883, 17 N. W. Rep., 132.

33. NEGOTIBLE PAPER—STIPULATION TO PAY ATTORNEY'S FEES.
A written agreement to pay a sum of money at a certain time, and if not paid when due, to pay all costs and charges for collecting the same, with interest, is not, in legal contemplation, a negotiable promissory note. *Maryland, etc, Mfg. Co. v. Newman.* Md. Ct. App. Oct. Term, 1883, 11 Md. L. Rec. 1.

34. NEGOTIBLE PAPER—NOTE DELIVERED ON CONDITION—BONA FIDE HOLDER.
Where one person delivers to another his negotiable promissory note, under an agreement that it is not to be put in circulation until the happening of some event, or that in a certain contingency it is not to be considered valid or delivered, and the person to whom it is delivered puts it in circulation in violation of the agreement, an innocent holder for value, before maturity, may maintain an action thereon notwithstanding such violation. *Graff v. Logue*, S. C. Iowa, Oct. 18, 1883., 17. N. W. Rep., 171.

35. NEW TRIAL—IMPROPER REMARKS OF COUNSEL.
Where a statute is explicit that the district attorney shall not refer to the fact that the defendant did not testify in his own behalf, and for him to do so, expressly or in substance, is misconduct that warrants the granting of a new trial. *State v. Graham*, S. C. Iowa, 17 N. W. Rep., 192.

36. NEW TRIAL—VERDICT FOR NOMINAL DAMAGES.
Where the error involves no more than nominal damages reversal will not be granted. *Wire v. Foster*. S. C. Iowa, 17 N. W. Rep., 175.

37. PROBATE LAW—WILL—DIRECTION TO CONTINUE BUSINESS.
When a testator authorizes his executor to continue his busines after his decease, only such property as is actually used in the business is liable for debts incurred therefor. *Fridenburg v. Wilson*, S. C. Fla. Nov. 15. 1883.

38. PUBLIC OFFICERS—LIABILITY FOR ACTS DONE IN GOOD FAITH.
The local directors of a sub-school district, dismissed a person found in possession of the school house and teaching the public school, under their control, on the ground that he had not been employed, and placed a teacher they had employed in charge of the school. *Held*: that they were not liable personally, in damages, for such dismissal, if acting in their official capacity, in good faith, and in the honest discharge of duty. *Gregory v. Small*, S. C. Ohio, Oct. 30, 1883. 40 Ohio L. J., 410

39. RAILROAD—LIABILITY FOR REFUSAL TO RECEIVE FREIGHT—WANT OF FACILITIES AS A DEFENSE.
When by an accident upon another railroad, a company has an extraordinary amount of freight thrown upon it, if it possesses all the facilities requisite for the transaction of its ordinary volume of business, it is justified in refusing to receive freight, except on the condition that it shall not be liable for delays. *Dawson v. C. & A. R. R. Co.* S. C. Mo., Dec., 1883.

40. RAILROAD—TICKET FROM A. TO B.—REFUSAL TO STOP AT B.—MEASURE OF DAMAGES—EXCESSIVE.
Where the plaintiff purchased at A. a ticket to B. the station agent assuring her that the train would stop at B. but the conductor of the train, which was a through express to C. refused to stop at B. but carried her through to C. and she was there obliged to procure a carriage for C. and upon her arrival, found her daughter, whom she came to see, dead, the company is responsi- for the mistake or misdirection of the statio

master, and not for the refusal of the conductor. The measure of damages is the sum paid to return to B. the value of her time and the inconvenience she suffered. Judgment for $750 was for excessive damages. *Marshal v. R. R. Co.* S. C. Mo. Dec., 1883.

41. SALE—CONDITIONAL SALE—PREMATURE ACTION—TROVER.

Where a sale is made, upon condition that the title should not pass until the price is fully paid, the vendee is liable in trover for the price, before the expiration of the term of credit if he converts the property to his own cause. *Lacy v. Johnson*, S. C. Wis. Oct, 23 1883.

42. SPECIFIC PERFORMANCE—CONTRACT OF SALE BY WIDOW—ELECTION—WILL.

1. Specific performance will be refused of a contract made by a widow the day after her husband's funeral for the sale of property devised to her by her husband, before she could intelligently exercise her election to take against his will, which she subsequently did. 2. Such contract does not amount to an election to take under the will. *Elbert v. ONeil.* S. C. Pa. 14. Pitts. L. J. 165.

QUERIES AND ANSWERS.

*[**** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

85. A sues B in justice's court upon a promissory note for $50, executed by B to A. B claims that he owes A but $5, and that the note should have been for that amount only; but either through the fraud of A or the mutual mistake of the parties, he made the note for the larger amount, and he desires to tender the amount equitably due, and make the above deense to the suit. Has the justice of the peace jurisdiction to try the issue made by such an answer? If not, would an appellate court of common law jurisdiction have jurisdiction to try the issue upon appeal? or what would be the proper course for B to take in such a case? B.

West Bend, Wis.

86. The statutes of Florida allow a jury of six men to try all cases of felony, except capital ones. Is not such a statute in conflict with the Constitution of the United States as construed when adopted? Can the legislative body of any State, constitutionally, curtail the number of jurors to try a felony to any number less than twelve? If so can it not reduce the number to two, or one, as it may see fit? A. C. C.

Sunterville, Fla.

QUERIES ANSWERED.

Query 84. [17 L. J. 478.] A party was indicted in our District Court for a crime under our statute. Our Code provides that "any person accused of crime may offer himself as a witness on his own behalf and shall be allowed to testify as other witnesses in such cases, and when such accused shall so testify he shall be subject to all the rules of law *relating to cross-examinations of other witnesses.*" Upon the trial the accused went on the witness stand and testified in his own behalf, and after cross-examination rested his case without offering other evidence. The prosecution then introduced and was permitted to prove that the accused's general reputation for *truth and veracity was bad.* Query: Can this be done? We contend that until the accused has placed his *character* in issue by offering witnesses in his own behalf the prosecution cannot attack, and that in any event the accused cannot be impeached *by evidence of reputation as a witness could* be, but we admit his liability to impeachment by proving contradictory statements, he is not *a witness* in any other sense. B.

Vancouver, W. T.

Answer No. 1. The statute under which the accused was tried, permitted the defendant to testify in his own behalf, "subject to all the rules of law relating to cross-examination of other witnesses." Any witness may be impeached on the cross-examination, by showing his general reputation for truth and veracity to be bad. 1 Greenleaf, sec. 461. The character of the defendant can not be put in issue, except by himself; but in this case the character of the defendant was not in issue, but his general reputation for truth and veracity was, and properly so, as he could testify only on condition of being subject to such rules of law as are applied to all other witnesses on cross-examination. F. M. E.

Groesbeck, Texas.

RECENT LEGAL LITERATURE.

REYNOLD'S THEORY OF THE LAW OF EVIDENCE. The Theory of the Law of Evidence as Established in the United States, and of the Conduct of the Examination of Witnesses. By William Reynolds, of the Baltimore bar. Chicago, 1883; Callaghan & Co.

This little work is intended to present the law of evidence as a complete scientific and rational system, consisting of a series of rules. The principal rules are all declared, and the reasoning upon which each is founded set forth. The practical application of the rules is thus expected to be facilitated. That such must be the result is too evident to be doubted. It is surprising that so much can be said in so small a book.

NOTES

——A lawyer's little son was asked what becomes of bad men. He replied: "They come to my papa to help them."—*Ex.*

——"Have you ever before been punished by the law?" asked an Austin justice of a colored culprit. "Yes, I called a man a liar, and I had to pay a fine." "Is that the only time you have come in conflict with the law?" "Now dat yer speaks ob hit, jedge, I bleeves I was in the penitentiary for ten yeahs, if I disremembers myself."